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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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HONDA MOTOR CO., LTD.,
HONDA R&D CO., LTD.;
AND AMERICAN HONDA MOTOR CO., INC.,

*Petitioners,*

*v.*

KARL L. OBERG

*Respondent.*

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OREGON

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## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## INTRODUCTION

The petition for certiorari filed by Honda Motor Co., Ltd. and its affiliates ("Honda") is an ill-disguised effort to use the fortuitous pendency of *BMW of North America, Inc. v. Gore*, No 94-896 (cert. granted Jan. 23, 1995) to postpone by a year or more the date on which the judgment in this decade-old case must be paid. Honda's aim is quite explicit: to have this case "held" through the end of the 1995 Term, and then remanded for months more of proceedings in the Oregon Supreme Court, followed by months of further delay occasioned by a renewed petition for certiorari in this Court. *See* Pet. 2 ("it would be appropriate . . . for the Court to hold this petition and dispose of it as appropriate in light of the decision in *Gore*"); *id* at 10 (it "would be appropriate for the Court to hold this petition pending disposition of *Gore*"); *id.* at 15 ("it would be appropriate . . . for the Court to hold the petition in this case pending disposition of *Gore*, and to vacate the decision below if the petitioner prevails in *Gore*").

Honda's petition should be rejected out of hand because the grounds on which it seeks to have the case held are not grounds that it preserved in the Oregon state court system. Pursuant to 28 U.S.C. § 1257(a), and Rules 14.1(h) and 14.5 of the Rules of this Court, certiorari will be denied unless the petition for certiorari documents, with specific citations to the record, where the federal issues raised in the petition were preserved for review. Honda has ignored that requirement, and it is barred from attempting to make the required jurisdictional showing in its reply brief (which Oberg will be unable to answer). Further, it is clear that Honda did not, in fact, preserve the federal issues that it now seeks to raise.

## STATEMENT OF THE CASE

In 1985, while respondent Karl Oberg was driving one of Honda's three-wheel all-terrain vehicles ("ATVs") up a steep hill, the 325-pound vehicle suddenly flipped over backwards on him. It crushed many of the bones in his face and skull, causing serious permanent injuries. *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2334 (1994); Pet. App. 11a. Oberg filed suit, alleging

among other things that the vehicle had flipped due to its inherently dangerous design, that Honda was aware of the dangers, and that Honda nevertheless had promoted the vehicle as safe and failed to warn consumers of the grave dangers posed by ordinary operation of the vehicles.

A notice of proposed rulemaking by the Consumer Product Safety Commission cited ATVs like Honda's as constituting perhaps "one of the most significant and explosively growing product hazards ever considered by this agency."[1] The evidence indicated that Honda was aware of the safety risks but deliberately refused to make scientific tests of safety, to make needed safety improvements of known design flaws, to warn of these dangers, or to recall vehicles that were deceptively unstable and therefore inherently dangerous. Pet. App. 10a-11a.

Honda's defense at trial was that its ATVs were reasonably safe for their intended purpose and that the accident was all Oberg's fault. Although Honda acknowledged that it had promoted the ATV model that Oberg was driving as the "King of the Hill," Honda attacked Oberg as reckless for accepting the opportunity to ride the new model up a short, steep hill. Tr. 3:52. In Honda's view, its vehicles were perfectly safe and it was the riders of the vehicles who were at fault for the tens of thousands of injuries occurring each year. *See, e.g.*, Tr. 3:72-78; Tr. 18:1866-1947; Tr. 25:2864-81. Thus, Honda argued that this case simply involved "a rider who misjudged the technique and misjudged his own ability" to ride up the hill. Tr. 3:91. In arguments to the jury, Honda pursued a strategy of focusing solely on liability and declining to suggest any dollar figure for punitive damages as an alternative to Oberg's request for a $5 million award. Honda simply reiterated its "blame the rider" position that it had done nothing wrong, and thus that no punitive damages at all should be awarded.

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[1] *Oberg v. Honda Motor Co.*, 851 P.2d 1084, 1106 (Or. 1991) (Peterson, J., dissenting), *rev'd*, 114 S. Ct. 2331 (1994).

The trial judge gave the jury the extensive instructions that are required by Oregon law in product liability actions. *See Oberg*, 851 P.2d at 1095 n.11. The jury was told that punitive damages could be awarded only if Oberg made out his claim by "clear and convincing evidence." *Id.* Honda made no constitutional objection of any kind to *any* of the instructions governing the jury's determination of punitive damages; it merely objected to any instruction at all being given on punitive damages. Tr. 25:2959. Nor did Honda object to the jury being informed of its wealth, as part of its punitive damages deliberations.[2] Nor did Honda preserve any objection to reference by Oberg to "tens of thousands of persons" who suffered similar injuries, or in many cases death, from ATVs produced by Honda. Pet. 2-3. Further, Honda expressly waived the right it enjoyed under Oregon law to an instruction referring to "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damages awards to persons in situations similar to the plaintiff's." ORS 30.925(3)(g). See note 10, *infra*.

Although the twelve-person jury did not accept Honda's sweeping "blame the rider" defense completely, it did find some fault on both sides; it found Oberg 20 percent at fault for the accident and Honda 80 percent at fault. As compensation for Oberg's medical expenses, lost earnings and pain and suffering, the jury awarded $919,390.39, reduced to $735,512.31 in light of Oberg's partial fault. The jury also found that Honda was guilty of wanton misconduct and that a punitive damages award

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[2] Oberg was not allowed to introduce evidence regarding Honda's financial condition until he "presented evidence sufficient to justify . . . a prima facie claim of punitive damages." ORS 41.315(2). At trial, Honda did not preserve any objection that "Oberg's counsel . . . emphasized during his closing argument that Honda's net worth was some $4.9 billion." Pet. 3 (citing Tr. 24:2838). In fact, Honda explicitly approved a stipulation concerning the total wealth represented by all of Honda's lines of business, prepared by Oberg, which Honda said was "acceptable as is," and which informed the jury: "If witnesses were called, the evidence would establish that the net worth of the defendant Honda companies is $4.9 billion." Tr. 23:2703. This was duly read to the jury. *Id.* Later, Honda chose not to object to the jury charge instructing the jury to take into account this stipulated wealth figure in setting punitive damages. Tr. 25:2959-60.

of $5 million was necessary to deter misconduct by Honda and others in the future.

Honda filed extensive post-trial motions, which were denied by the trial court. Honda reiterated its challenges to the verdict in the Oregon Court of Appeals and again in the Oregon Supreme Court. This Court granted certiorari and held that the Oregon courts had failed to provide judicial review of the amount of punitive damages awarded by the jury, and that such a practice was inconsistent with the Due Process Clause of the Fourteenth Amendment. *Oberg*, 114 S. Ct. 2331 (1994).

On remand, the Oregon Supreme Court entertained extensive briefing and argument. It declined to send the case back to the trial court in the first instance, explaining that "the judgment was entered more than five years ago; we see no reason to delay the final resolution of this case any longer." Pet. App. 8a. In a decision dated Feb. 2, 1995, the Oregon Supreme Court unanimously affirmed its prior judgment, holding that there was ample evidence in the record to support the jury's $5 million punitive damages award. Pet. App. 10a-13a.

## REASONS FOR DENYING THE WRIT

Pursuant to 28 U.S.C. § 1257(a), this Court will not consider claims that were not raised before or passed on by the state court whose judgment it is asked to review. In cases arising from state court, this rule is jurisdictional in nature. *See, e.g., Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-77 (1988); *id.* at 85 (White, J., concurring); *id.* at 89 (Scalia, J., concurring in part and in the judgment). Implementing this principle, Rule 14.1(h) of this Court requires a petition for certiorari to specify in the statement of the case:

> [T]he stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the

> record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

*See, e.g.*, *Webb v. Webb*, 451 U.S. 493, 495 (1981).

As to each of the federal issues raised by Honda's petition, Honda has utterly failed to comply with this rule. For example, Honda claims that the Oregon Supreme Court held below "that judicial review of *compensatory* damages remains unavailable in Oregon," Pet. 2; *see also id.* at 6-9, without quoting any language supporting this assertion, and without demonstrating that Honda timely raised a federal constitutional objection to any such rule. Honda claims that the Oregon Supreme Court "reject[ed] an excessiveness claim that is similar in many respects to the one now before the Court" in *Gore*, *id.* at 2, without citing any examples of these supposedly "many respects," and without demonstrating that Honda preserved the federal issues that are being raised in *Gore*. In particular, Honda complains that the jury was urged at trial to punish Honda for injuries done to tens of thousands of others nationwide, *id.* at 2-3, without showing that it timely preserved a federal objection to such an argument. Honda appears to complain about overly vague jury instructions that required the jury to "'apply [its] own considered judgment to determine the amount,'" *id.* at 3 & n.2 (quoting Tr. 24:2942), without demonstrating that it preserved a federal objection to the instructions. These deficiencies are easily explained: Honda simply failed to preserve its arguments at the state court level.

The constraints on the exercise of this Court's jurisdiction reflected in 28 U.S.C. § 1257(a) and in Rules 14.1(h) and 14.5 dictate that Honda's petition should be rejected on the basis that Honda has not met its affirmative burden to show, in the petition itself, that the federal issues on which it seeks review were timely preserved in the state court. Granting Honda's request that this case be held based on arguments that Honda might

attempt to raise for the first time in its reply would encourage petitioners to flout the rules in an effort to secure a strategic advantage over respondents, by denying them a chance to respond to arguments over jurisdictional facts. Although respondent Karl Oberg has no obligation to address these issues, the remainder of this brief summarizes Honda's failure to preserve its federal issues below, clearly necessitating a prompt denial of certiorari.

## I. THE FIRST QUESTION IS NOT PROPERLY PRESENTED, FOR HONDA DID NOT PRESERVE BELOW ITS FEDERAL OBJECTION TO THE COMPENSATORY AWARD

1. Honda claims that the Oregon Supreme Court held that compensatory damage awards "remain unreviewable in Oregon," Pet. 5 (quoting Pet. App. 4a n.6), and argues that this unreviewability violates due process. *Id.* at 6-9. The Oregon Supreme Court held no such thing, as the very footnote cited by Honda on this point makes clear.

In its decision unanimously affirming the judgment below, the Oregon Supreme Court explicated "the standard for post-verdict judicial review of an award of punitive damages," in the wake of this Court's decision in *Oberg*. Pet. App. 7a. Just before laying out that standard, however the court indicated in a footnote: "This holding is limited to awards of punitive damages and does not extend to compensatory damages." Pet. App. 4a n.6. Thus, the Oregon Supreme Court elected not to explicate the standard of review for compensatory damages. The court issued *no holding* on the subject of compensatory damages review. There is nothing in this footnote that indicates an actual holding of the court that *no* judicial review of compensatory damages is available in Oregon.

2. The reason for the Oregon Supreme Court's decision not to discuss the standard for post-verdict review of compensatory damages is plain: that issue had long before been waived in this case. Honda did not assert a due process claim with respect to the compensatory award until it sought

discretionary review in the Supreme Court of Oregon in the *first* round of appellate proceedings in this case. Honda did not advance any such claim in the trial court, nor did it assign the point as error in the Oregon intermediate appellate court. Therefore, it is clear as a matter of Oregon law that the issue had been doubly waived by the time the case reached the Oregon Supreme Court for the *first* time. *See, e.g., In re Quinn*, 881 P.2d 795, 800 (Or. 1994).[3]

When this case was previously before this Court, Oberg repeatedly pointed out Honda's procedural default. *See* Br. in Opp. Cert., in No. 93-644, at 2, 10 (Dec. 1993); Br of Respondent in No. 93-644, at 12 n.13 (Apr. 1, 1994). Even Honda admitted that the Oregon courts had not passed on its tardy challenge to the compensatory award. Br. of Petitioner in No. 93-644, at 8 (Feb. 1994). Nor did this Court's ruling in *Oberg*, 114 S. Ct. 2331 (1994), pass on Honda's challenge to the compensatory award.

3. If Honda had a federal objection to the Oregon system for reviewing compensatory damages, it was obligated to present a timely objection as required by state procedural rules. The Oregon Supreme Court's refusal to address any federal issues involving compensatory damages review must be presumed to be "due to want of proper presentation in the State courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (citations and internal quotations omitted). *See also Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974); *Street v. New York*, 394 U.S. 576, 582 (1969); *Chicago, I. & L. R. Co. v.*

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[3] Or. R. App. P. 5.45(2) provides that "[n]o matter assigned as error will be considered on appeal unless it was preserved in the lower court and assigned as error in the party's opening brief." *See, e.g., Don't Waste Oregon Comm. v. Energy Facility Siting Council*, 881 P.2d 119, 129 (Or. 1994); *State v. Cunningham*, 880 P.2d 431, 441 n.17 (Or. 1994), *cert. denied*, 115 S. Ct. 1317 (1995); *State v. Pinnell*, 877 P.2d 635, 639 (Or. 1994); *State v. Bucholz*, 855 P.2d 1100, 1106 (Or. 1993); *State v. Langley*, 839 P.2d 692, 697 (Or. 1992); *Ailes v. Portland Meadows, Inc.*, 823 P.2d 956, 958 (Or. 1991); *State v. Brown*, 800 P.2d 259, 265-66 (Or. 1980).

*McGuire*, 196 U.S. 128, 131-33 (1905). Honda has made no attempt at this showing, nor could it. Certiorari on this ground is therefore ruled out.

## II. THE SECOND QUESTION IS NOT PROPERLY PRESENTED, FOR HONDA DID NOT PRESERVE BELOW ITS FEDERAL OBJECTIONS TO THE PUNITIVE AWARD

Honda contends that the punitive award in this case is excessive and that the petition should be held pending the disposition of *BMW of North America, Inc. v. Gore*, No. 94-896. Honda's arguments have no merit and are a transparent attempt to further delay payment on a judgment that has been outstanding for six years. Pet. App. 8a.

1. Honda's arguments to this Court are precisely contrary to its position before the Oregon Supreme Court, where it sought a remand to the state trial court — and further delay — on the ground that "there are neither findings by the lower courts nor full briefing before this Court on the relevant issues."[4] Honda claimed that excessiveness review "would [not] . . . be [a] simple matter" and that the parties' treatment of the excessiveness issue was so "abbreviated" that the Oregon Supreme Court should not reach it.[5] If this case is not suitable for excessiveness review by the Oregon Supreme Court, it is difficult to fathom how it could possibly be suitable for review by this Court in the first instance.

2. Honda did not meet established requirements for framing *any* federal constitutional claim before the Oregon Supreme Court. On remand from this Court, Honda urged that the punitive award was "excessive" because, for example, the company's conduct was supposedly not sufficiently reprehensible,[6] but Honda did not specifically cite *any* federal

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[4] Honda Reply Supp. Br. on Remand at 14 (filed with Or. S. Ct. Sept. 6, 1994).

[5] *Id.* at 11, 12.

[6] Honda's First Supp. Br. on Remand, at 13 (filed Aug. 24, 1994) ("it is plain that defendants' conduct barely registers on the culpability scale. Plaintiff did not allege that defendants acted with intention to cause harm").

constitutional provision with respect to its excessiveness argument. Honda used the term "excessive," but it quite deliberately invoked a mish-mash of "common law principles announced by [the Oregon Supreme Court] and other courts."[7] Honda had previously advised this Court that its excessiveness claim was solely under state law,[8] and on remand Oberg pointed out to the Oregon Supreme Court, without contradiction, that all Honda was requesting was judicial review under state-law standards.[9]

It is well-settled that arguing simply that an award is "excessive" is inadequate to frame a federal constitutional claim. *Bankers Life & Cas. Co.*, 486 U.S. at 77-78; *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2723-24 (1993) (plurality opinion). Indeed, a "vague appeal to constitutional principles" or even "'[a] generic reference to the Fourteenth Amendment,'" *Bankers Life & Cas. Co.*, 486 U.S. at 77 (internal quotation omitted), is inadequate. Here, as in *Bankers Life*, the "failure to invoke the Federal Constitution is especially problematic" because "even if the [state] supreme court understood [Honda] to be offering a constitutional challenge, it may well have taken that challenge to be anchored in" state law. 486 U.S. at 78.

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[7] Honda's First Supp. Br. on Remand, at 13 (filed with Or. S. Ct. Aug. 24, 1994).

[8] *See* Reply Br. of Petitioners in No. 93-644, at 1-2 (Apr. 13, 1994) (under "the 'excessiveness review' that Honda believes is required by the Due Process Clause . . . a court would remit or set aside an award that no reasonable jury could have found to be proper compensation or appropriate punishment under the criteria established by state law"); Transcript of Argument, No. 93-644, at 4-5 (Apr. 20, 1994) (Honda's objection is that Oregon courts "lack[] the power to consider whether [punitive damage awards] conform to the law of Oregon," and Honda is "not saying in this case that the State of Oregon, or that the other States . . ., have to have any particular substantive law of damages").

[9] *See* Oberg's Second Supp. Br. on Remand, at 6 n. 9 (filed with Or. Sup. Ct. Sept. 6, 1994) (collection Honda's representations on this point).

To be sure, after this Court granted certiorari in *BMW of North America, Inc. v. Gore*, No. 94-896, Honda filed a petition for reconsideration with the Oregon Supreme Court raising the excessiveness issues it now seeks to present to this Court. But it is elementary that raising a federal question for the first time in a petition for rehearing is inadequate unless the state court actually entertains the petition and expressly decides the question. The Oregon Supreme Court's summary disposition of the petition in this case did not preserve Honda's claims. R. Stern, *et al.*, SUPREME COURT PRACTICE § 3.21(c) (7th ed. 1993).

3. There are further reasons that none of the specific excessiveness issues Honda raises in the petition for certiorari is properly presented.

a. There is no "multiple punitives" issue in this case. At trial, Honda affirmatively declined to invoke the protection of ORS 30.925(3)(g), which provides that the assessment of punitive damages awards must consider "[t]he total deterrent effect of other punishment imposed on the defendant as a result of his misconduct." Honda took the position that this provision was inapplicable because there had been no previous punitive awards against Honda based on its misconduct.[10]

At trial, Honda never attempted to place into the record any documentary materials relating to additional litigation against Honda based on its defective ATVs. Further, Honda represented to the Oregon Supreme Court on remand that the Oregon punitive damages scheme *already* provided protection against multiple awards for the same course of misconduct.[11] Honda

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[10] Honda argued to the trial court that, because there had been no previous punitive awards, the provision "is, under the current state of the evidence, not applicable." Appendix A to Oberg Or. S. Ct. Br., at App-2 (filed Dec. 31, 1991).

[11] Honda argued that "this Court has itself recognized the 'potentially onerous effects of multiple awards of punitive damages,' noting that the problem may be addressed by, among other things, 'remittitur' and consideration by the factfinder 'of prior and potential punitive awards in each case.'" Honda's First Supp. Br. on Remand 34 (filed with Or. S. Ct. Aug. 24, 1994) (quoting *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1272

raised no argument that the award in this case constituted a violation of federal substantive due process.

It is absurd for Honda now to argue that "a $5 million award to Oberg could be justified only if total punitive damages of *$25 billion* would not be excessive for Honda's course of conduct." Pet. 11 (emphasis in original). The Oregon court's decision obviously implies no such thing. In fact, there is every reason to presume that the Oregon Supreme Court would have addressed Honda's concerns, if Honda had actually raised any federal claim. After all, in its decision, the Oregon Supreme Court noted the Oregon statutory provision limiting multiple awards against a defendant for the same course of conduct. Pet. App. 10a.

In any event, this case is an extremely poor vehicle to examine the "multiple punitives" argument. As Honda admits, it has not paid any punitive damages for its defective ATVs in any other case that has proceeded to finality. Pet. 11. Whether any additional punitive awards will be imposed is entirely speculative, since three-wheeled ATVs are no longer on the market. If in the future Honda faces the threat of excessive multiple punishment, it can then raise a constitutional objection.

b. Nor is there any merit to Honda's claim of "extraterritorial punishment." This claim was never raised in the Oregon courts below, even during the first appeal prior to this Court's decision. It plainly has been waived.

Furthermore, the argument has no merit. Honda selectively quotes portions of Oberg's closing argument at trial, but fails to mention that it raised no relevant contemporaneous objection to that argument. Nor did Honda raise any objection to the jury

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(Or. 1980)). Citing ORS 30.925(3)(g), Honda contended that "[t]he Oregon Legislature also has specified that determination of a punitive award in a products liability action must take account of '[t]he total deterrent effect of other punishment imposed on the defendant as a result of the misconduct.'" *Id.*

instructions.[12] Moreover, the Oregon Supreme Court understood that the evidence of thousands of injuries resulting from ATV use had been employed not to punish Honda for other acts but rather to prove the malicious and reprehensible nature of Honda's misconduct, by illustrating that Honda had been on notice of safety problems and yet had done very little to prevent Oberg's accident:

> Evidence was presented that defendants actually knew, or should have known, for many years before developing the ATV model that injured plaintiff, that their ATVs were highly likely to cause serious personal injury or death. *See* ORS 30.925(3)(a) & (b) [statutory factors providing that punitive damages should be imposed on "[t]he likelihood at the time that serious harm would arise from the defendant's misconduct" and "[t]he degree of the defendant's awareness of that likelihood"].

Pet. App. 10a.

Honda cites the state court's observation that ATVs caused "'numerous injuries.'" Pet. 10 (citing Pet. App. 11a). But this selective quotation is deceiving, for in context the Oregon court was discussing Honda's culpability for the injury to Oberg, not holding that Honda could be punished directly for these other injuries:

> There was evidence that, when plaintiff's injury occurred, defendants had notice, from the federal government agency investigating the safety of ATVs, that *numerous injuries were occurring* from the use of ATVs and that many of those injuries resulted from rearward tip-overs. According to the evidence, defendants maintained that there

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[12] In any event, the instructions were entirely proper. The jury was instructed emphatically and repeatedly that the information received from the Consumer Products Safety Commission (which did not mention any action taken or conclusions drawn by the agency) was only to be considered as notice to Honda that there was a safety issue related to vehicle overturns, not as evidence of any defect. Tr. 25:2959; *Oberg*, 851 P.2d at 1095 n.11.

> was nothing wrong with the design or testing of the product and that there was no reason to add safety mechanisms or to engage in safety tests to avoid the type of accident suffered by plaintiff.

Pet. App. 11a (emphasis added). Honda cites only the italicized portion of this language.

This case bears no resemblance to *Gore*, where petitioner BMW (represented by the same counsel of record who represents Honda in this case) has conceded that "evidence of similar acts of misconduct (wherever they occurred) traditionally has been considered relevant in assessing the reprehensibility of the misconduct at issue." Brief of Petitioner in *BMW v. Gore*, No. 94-896, at 22 (filed Mar. 1995). BMW has emphasized that it "raise[s] no claim in this case that the mere admission of extraterritorial transactions violate[s] [a defendant's] rights." *Id.* "Nor is there any issue here of the consideration of similar acts of out-of-state misconduct in gauging the appropriate punishment for the defendant's in-state activities." *Id.* Rather, BMW's argument is that *Gore* is an especially extreme case where "the Alabama Supreme Court has found that the jury directly punished BMW for its out-of-state conduct by using the total number of sales of refinished vehicles as a multiplier." *Id.* at 22-23. That is, *Gore* involves "direct extraterritorial punishment," *id.* at 23, where a jury multiplied the total number of a defendant's fraudulent acts (even those occurring out-of-state) by the defendant's gain from each transaction.

Plainly, no such multiplication occurred in this case, nor did the Oregon Supreme Court purport to uphold the award on such a basis. The award here is based on Honda's conduct with respect to Oberg, and Oberg alone. *Gore* has nothing to do with this case.

c. Honda also claims that the punitive award here is excessive because "it is [allegedly] far 'greater than reasonably necessary to punish and deter.'" Pet. 12 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)). As we have noted, Honda failed to preserve a federal claim on this issue, and

it also insisted before the Oregon Supreme Court that the record was too sketchy to serve as a good vehicle for appellate review. Moreover, it is apparent that the decision in this case is a fact-specific application of the principles of *Haslip* and *TXO* and does not warrant this Court's review.[13]

Nor does the excessiveness issue bear any relationship to the issues presented in *Gore*. Unlike the award in the *Gore* case, the punitive award here was imposed and reviewed according to a detailed state legislative scheme that prescribes seven criteria that must be considered by state courts and juries in assessing and evaluating punitive awards at trial and on appeal. Pet. App. 9a-10a. There can be no question that the Oregon Supreme Court faithfully applied these standards, as well as this Court's decisions in *Haslip* and *TXO*, in determining the reasonableness of the instant award. Pet. App. 10a-13a. The distorted arguments recycled by Honda in its Petition for Certiorari (at 12-15) were all considered and rejected by the Oregon Supreme Court (albeit as state-law claims).[14] Nothing in *Gore* could possibly alter the Oregon court's analysis. Nor could there be any reason to send this case back to the Oregon courts to give

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[13] There is a powerful reason for this Court *not* to engage in any fact-based review of the punitive award in this case: this Court is bound by the Re-Examination Clause of the Seventh Amendment and would be precluded from re-examining the jury's verdict according to such evidence. *See Capital Traction Co. v. Hof*, 174 U.S. 1, 12 (1899); *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U.S. 226, 242-43 (1897). Virtually the entirety of Honda's "excessiveness" challenge (Pet. 12-15) consists of information that this Court would be unable to consider.

[14] For example, Honda's attempt to claim exoneration from the CPSC's termination of rulemaking (Pet. 14-15) is fanciful. A total recall of all three-wheeled ATVs (the type at issue here) was deemed not cost-effective only because of the continuing improvement of safety resulting from the existing ban on sales of new three wheelers and the fact that such a recall would result in protracted litigation, at whose conclusion few three wheelers would remain in use in any event. *See* 46 Fed. Reg. 47173. Far from taking no action against ATVs, the Commission left in place the results of its strenuous and successful action to alleviate the threat to public safety posed by new three wheelers, including a ban on sales of new three wheelers and a public information campaign as to existing ones. It also pledged to continue monitoring efforts and reserved the possibility of future action if needed.

Honda yet another opportunity to raise the same tired arguments again.

## CONCLUSION

Honda has not complied with this Court's jurisdictional rules; further, the federal issues it seeks to raise, on the basis of which it asks that this case be held pending disposition of *Gore*, were not timely preserved in the state courts below. Certiorari therefore should be denied.

Respectfully submitted,

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